UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

— — —

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION

_____

Case No. 12-02311

ALL PARTS

_____ Hon. Marianne O. Battani

THIS RELATE TO ALL CASES

_____/

CERTAIN NON-PARTY ORIGINAL EQUIPMENT MANUFACTURERS' OBJECTION TO ORDER REGARDING THE PARTIES' RENEWED MOTION TO COMPEL DISCOVERY FROM CERTAIN NON-PARTY ORIGINAL EQUIPMENT MANUFACTURERS AND THEIR AFFILIATED ENTITIES

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Thursday, May 4, 2017

APPEARANCES:

For the Plaintiffs:
ELIZABETH T. TRAN
**COTCHETT, PITRE & McCARTHY, L.L.P.**
840 Malcolm Road
Burlingame, CA 94010
(650) 697-6000

For the Defendants:
ADAM C. HEMLOCK
**WEIL, GOTSHAL & MANGES, L.L.P.**
767 Fifth Avenue
New York, NY 10153
(212) 310-8281

*To obtain a copy of this official transcript, contact:*
*Robert L. Smith, Official Court Reporter*
*(313) 964-3303 • rob_smith@mied.uscourts.gov*

APPEARANCES: (Continued)

For the OEMs: KIMBERLY C. METZGER
**ICE MILLER**
One American Square, Suite 2900
Indianapolis, IN 46282
(317) 236-2100

TABLE OF CONTENTS

Detroit, Michigan
Thursday, May 4, 2017
at about 2:31 p.m.

– – –

(Court and Counsel present.)

THE CASE MANAGER: Please rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

You may be seated.

THE COURT: Good afternoon. All right. For the record, may I have your appearances, please?

MS. METZGER: Kimberly Metzger for --

THE COURT: I can't hear you.

MS. METZGER: Sorry. Kimberly Metzger for Subaru of Indiana Automotive.

MS. TRAN: Elizabeth Tran for the end payor plaintiffs.

MR. HEMLOCK: Adam Hemlock, Weil, Gotshal & Manges, on behalf of the Bridgestone and Calsonic defendants.

THE COURT: Okay. This is the OEMs' objections to the Master's order, so you may -- please take the podium.

MS. METZGER: Good afternoon, Your Honor. We are requesting -- the OEMs are requesting --

THE COURT: I'm going to ask you to keep your voice

up and maybe move that microphone a little closer to you.

MS. METZGER: Oh, sure. How's that, better?

THE COURT: Thank you.

MS. METZGER: The OEMs are requesting three primary types of relief with our motion. The first is relief under Rule 45(d)(1) related to the cost of the expenses that the OEMs incurred narrowing scope of the subpoena that was originally served. And then there are two requests -- two separate types of requests under 45(d)(2)(B)(2), these are compliance-related expenses; one is for follow-up questions related to the 30(b)(6) depositions, the expenses related to those, and then the second is for attorney fees related to compliance with the subpoena itself which was excluded from the Special Master's order.

If we could address the subpoena issue first under Rule 45(d)(1). This is not a request for cost shifting, Your Honor, and I think that's an important part of this argument because the portion of Rule 45 under 45(d)(2)(B)(2) is a cost-shifting type of statute and it's not what we are looking for. What we are looking for is relief under 45(d)(1) which is a relief in the form of a sanction for the serving parties related to their failure to exercise reasonable efforts to serve a subpoena that does not impose undue burden and expense on the parties that receive the subpoena.

Rule 45(d)(1) imposes an affirmative duty on the parties who serve a subpoena to serve one that takes reasonable steps to serve a subpoena that's not going to impose undue burden and expense, and the operative question here, Your Honor, is not whether the parties -- whose better able to bear the expense, what issue of public importance there may be, that is an argument under Rule 45(d)(2)(B)(1). The operative question for purposes of attorney fees related to narrowing the scope of subpoena is whether or not the serving parties exercised reasonable steps to avoid imposing undue burden and expense, and in this particular case, Your Honor, clearly the parties did not.

The fact that the Rule 45(d)(1) describes what we are seeking as sanctions naturally makes everybody cautious, and we are looking for an appropriate case because sanctions are not something that should be lightly imposed, but appropriate caution in this case does not necessarily mean that an award is inappropriate, and in this case it actually is a textbook case where there's an award under Rule 45(d)(1).

The subpoena as served included 36 requests in the body, 18 in the attachment and more than 100 subparts. It sought detailed information and data on 56 automobile parts and all vehicles manufactured from 1992 to 2014. All of the subpoenas have been described in various ways by the various

parties. The essence of it is that it essentially sought every scrap of paper, every digital byte of data related to the recipient's purchase and sale of auto parts regardless of their size, regardless of the market share, every subpoenaed entity received the same subpoena.

The most interesting thing about the subpoena perhaps, Your Honor, is the fact that the parties essentially had a preview of what was going to happen when they actually served it. This is back in June of 2015 when -- and now Subaru of Indiana Automotive was not a party to the litigation at this point so we are getting this -- and we are not a party at this point, but we were not involved at all, so we are getting this information from the record, but what the record indicates is that the Special Master ordered the parties to serve a single subpoena on the potential subpoenaed entities, the OEMs and some other entities that were not OEMs, and the purpose of serving the single subpoena was supposed to be to lessen the burden and expense on the parties who received it.

THE COURT: That is pursuant to the decision of the Court that there is to be this subpoena, right?

MS. METZGER: Yes, yes. And instead of curating -- taking the universe of what they might like to have and curating that down somehow, instead what appears to have happened is that every party that served the subpoena took

every request that they might wish to have and simply lumped it into a single document and served it. So there was no curating, there was no apparent thought to what may be most important, what may be least important, what can we do without, and these are the choices that we make in litigation every day.

For example, if the Court says you can take one 7.5 deposition, you may have to do without some information in order to meet those deadlines and those time lines, and that's the case here. What appears to have happened is that each of the parties took the universe of information that they would like to have and simply put it into a single document and that was the document that was served.

There was some back and forth in the court in June -- I believe June and July of 2015 related to the scope of this subpoena. One of the OEMs who was a party to the case at the time served some objections to the -- interposed some objections to the subpoena and some other folks did as well, talking about the monumental breadth, what was to be expected if the subpoena was served, and the Special Master appeared to agree with that and said I'm not going to rule on these objections, what is actually happening here is that the objections are premature, but what the Special Master did recognize is that the subpoenaed entities had what he called a vital interest in avoiding undue burden and expense, and

the Special Master predicted that there would be litigation by the subpoenaed entities to protect this vital interest if the subpoena was served in the form that it was. So the parties had a preview of exactly what was going to happen if they served the subpoena and that is precisely what did happen.

To be clear, the Special Master never blessed the subpoena, never said it was proportional, never said it was appropriate, simply said that I'm not going to rule on these objections at this point. We will deal with the objections when the subpoenaed entities receive the subpoena and see what they do with it. And that, Your Honor, we would say was an inappropriate flipping of the burden.

Instead of instructing the parties to curate their subpoena so it truly does encompass the most reasonable request, the most necessary request, and is something that is reasonable and appropriate and proportional under the circumstance, the burden was pushed onto the subpoenaed recipients to work after the fact with the parties to narrow the scope of the subpoena to something that's reasonable, and we would say that was inappropriate because once the subpoena was served, of course, the parties or the subpoenaed recipients had no choice at that point but to try to narrow the scope because compliance would have been virtually impossible.

And there is an extensive record on the fact that the parties went back and forth trying to narrow the scope of the subpoena, I believe it is ECF Document 1227, and the exhibits to that show the parties' correspondence and, of course, we are going to qualify those in various ways. The parties are going to qualify them a different way, but the correspondence speaks to itself. There was no dragging of the feet by the OEMs who received the subpoena, there was no attempt to delay the process. What the parties will say is that we incurred expenses because we didn't immediately start to comply, we didn't immediately sit down with the parties and begin to say -- help them narrow the scope of the subpoena which is something that should have been done at the outset before the subpoena was served.

THE COURT: But you and the parties met for some time or had different communications regarding narrowing the scope over the period -- an extensive period of time?

MS. METZGER: We did, we did, but that was after the subpoena was served, and those were all expenses that the OEMs naturally needed to retain outside counsel for. The burden and expense on the employees within the OEM groups to respond to those requests and to prepare those letters and those correspondences, and those never would have occurred if the subpoenaed -- if the parties serving the subpoenas had sat down and thought what do we need the most here, what is

most important, not what is everything that we might like to have in a perfect world but what is most important for our needs right now, and those are the things that we are going to ask for.

And there was -- Judge Alsup in the Northern District of California in the Straight Path vs. Blackberry case made a statement that we think is particularly appropriate here. In awarding fees under 45(d)(1) for an overbroad subpoena Judge Alsup said the litigants should not be encouraged to demand the moon, thinking they can always fall back on something reasonable.

THE COURT: You know I'm missing what you're saying because you are going so fast.

MS. METZGER: Sorry.

THE COURT: Please slow down.

MS. METZGER: Sure. Judge Alsup of the Northern District of California in the Straight Path vs. Blackberry case noted that litigants should not be encouraged to demand the moon, thinking they can always fall back on something reasonable; they should be reasonable from the start.

So instead of throwing everything against the wall and seeing what sticks, which is what the parties did here, they should have curated the subpoena from the front part and come to us in the first instance with something that was reasonable and something that was workable for us.

THE COURT: Okay.

MS. METZGER: There are several periods of time -- Your Honor, in thinking about what it is that we are actually asking for, there are several periods of time that are relevant. First is the OEM group negotiations that were conducted to narrow the scope of the subpoena, and the dates here were approximately July 2015, which was the date of service, through February 19th, 2016, which was the date of the SSE's response to the partie' motion to compel. And in that case, Your Honor, you can see in Document 1227 and the exhibits, you can see the correspondence back and forth between the parties and between the OEMs attempting to narrow the scope of the subpoena. Almost all of that work was driven by the SSEs, by the OEMs, and there was some periods of delay that were interposed by the parties not responding to our requests, and throughout this process the OEMs attempted to focus the parties on what do you have -- what do you have from each to other, what can you get from each other, what are the gaps in the record that you need us to fill; we never got answers to those questions. And you can see the documentation flowing back and forth, and do we need to comply with the subpoena at all, do you have what you need already, and are you just trying to get duplicative information from us? We were also trying to focus the parties on the size of the SSEs and their share of the U.S.

market of completed autos, and is the information that you get from us actually going to make a difference in your analysis.

And then there was the motion to compel that was filed on January 19th, and the OEMs' response to that motion to compel, which was filed on February 19th, 2016. And as of that date, Your Honor, the OEMs' response -- the parties had made one offer of compromise on the subpoena which came on Thanksgiving eve, the offer was cosmetic, it did not reduce the burden on the SSEs, and you can see our chart of cosmetic changes in Document 1227-4, and despite months of requests by the SSEs the parties had refused to discuss information already in their possession and to identify gaps in the record that the SSEs could fill.

Even as cosmetically modified by the date we were required to respond to the motion to compel, the subpoena sought nearly 90 categories of documents for time periods ranging from 12 to 22 years. This would include every part the OEMs purchased for decades, every vehicle they built, every vehicle they sold, and every vehicle their customers sold. The subpoena at that point remained facially overbroad and it also violated the rule of proportionality.

In responding to the subpoena -- I'm sorry, to the motion to compel, the SSE -- the larger SSE group retained an expert, an economist, who based on his review of the

information and his experience in antitrust matters involving questions of impact and damages at the direct purchaser and indirect purchaser level. He concluded that much of the information that was sought in the subpoena was unnecessary to conduct a reliable estimate of impact and damages.

The smaller SSEs also hired an expert, another economist, who opined in an affidavit and in a declaration that the smaller SSEs -- what we called the smaller SSEs, would not contribute appreciably based on their market share to any model of damages that would be created later on by the parties. So the smaller SSEs should not have had to respond to the subpoena at all.

There were a variety of mediations and hearings on the motion to compel. There was some drafting of orders that was required, and, Your Honor, the narrowed list that the SSEs received from the parties was not received until October 14th of 2016, so more than almost 18 months after the subpoena was served, that's when we got a narrowed request, and even that narrowed request simply recited each type of data or document that was identified in the 30(b)(6) deposition. So we would say that that narrowed request wasn't even that narrow.

So at this point we have been litigating for almost a year and a half and for the first time we are receiving something that is purporting to be a narrowed list of

requests, so that's where we are on the subpoena, Your Honor.

THE COURT: Okay.

MS. METZGER: In terms of the follow-up questions for the 30(b)(6) depositions, the Special Master's order awarded the SSEs some attorney fees related to the 30(b)(6) depositions but excluded a period of follow-up where the parties were asking additional questions, and the expenses and the fees that were related to the 30(b)(6) depositions did not carry forward into that period where additional follow-up was required, and that should have been included in the Special Master's order.

THE COURT: Were those -- those were the non-attorney fees, right?

MS. METZGER: I'm sorry?

THE COURT: Were those the non-attorney fees?

MS. METZGER: We were awarded outside counsel fees as well related to the 30(b)(6) depositions.

THE COURT: The 30(b)(6)?

MS. METZGER: Yes. We were not awarded attorney fees related to compliance with the deposition, the actual production of documents, and we are wondering why that is the case when attorney fees were awarded for the 30(b)(6) depositions. It would be a natural carryover to award them as well for compliance with the subpoena, and that is another portion of our request.

Is there anything I can answer for Your Honor?

THE COURT: I just want to get this clear.

MS. METZGER: Sure.

THE COURT: The question is -- or one of the questions is whether you are entitled to non-attorney costs related to the deposition follow-up questions?

MS. METZGER: The employees who were actually deposed expended time and resources as well in collecting information and gathering information for that follow-up, so that's what that relates to.

THE COURT: And the attorney fees in the last question are related to the document collection?

MS. METZGER: Yes, that's our request.

THE COURT: All right. Thank you.

MS. METZGER: Thank you, Your Honor.

THE COURT: Counsel?

MS. TRAN: Good afternoon, Your Honor.

THE COURT: Good afternoon, Ms. Tran.

MS. TRAN: My name is Elizabeth Tran. I represent the end payor plaintiffs, though I will be responding on behalf of the serving parties today.

We've been negotiating for 18 months, we've had two motions to compel, we've had three mediations, we've had six 30(b)(6) depositions of 14 hours each, and the OEMs are still fighting the subpoena, the very subpoena that this Court

instructed the parties to get together to draft and negotiate in January 2015. This subpoena is comprehensive because it had to meet the discovery needs of all the parties in the case.

THE COURT: What did you do to narrow it down?

MS. TRAN: You first instructed us to meet and confer on it in January 2015. Over the course of three months the parties worked together to put together the requests they needed. Defendants, plaintiffs, subgroups of plaintiffs all had different sorts of needs. For example, the truck plaintiffs needed truck data, upstream and downstream. End payors needed -- end payors and auto dealers are in the same distribution chain, but they needed information that was different from what defendants also needed. So we had to get together and, you know, get everyone's request in the same document. And what we ended up after three months with was a subpoena with 37 parts -- 37 requests. After the first round of negotiations we narrowed it down to 14 requests, and we were able to do this because we compromised on a lot of the requests that we originally wanted.

If you recall from all the pleadings so far with respect to OEM discovery, we say that the OEMs first were willing to negotiate with us individually but then they banded together and refused to meet and confer with us

individually. They were unwilling to tell us basic questions, just as basic as how far their data systems went back. So a lot of what we were doing was feeling our way in the dark. Nevertheless, we narrowed it down to 14 requests.

And after the depositions took place, after we went to mediation with the Special Master, we further narrowed down the subpoena. For example, we tabled discovery in wire harness; we agreed to stagger upstream parts-specific discovery such that we would prioritize bearings and AVRP which had class certification schedules, and then staggered the rest of the cases.

With respect to upstream discovery, we limited the amount of non-defendant suppliers from whom we sought information. With respect to downstream discovery, we decided that it would be most efficient and -- most efficient and most effective to obtain information from OEMs with respect to vehicle data, so we narrowed our request to just specific vehicles so that they could just produce one set of downstream data that would cover all of our needs. And that downstream portion today where we have agreements, that's about 75 percent of our subpoena, 25 percent relates to upstream part-specific discovery.

I want to go back to the Special Master's order on cost sharing. He awarded the OEMs -- or he ordered the parties to pay 60 percent of the OEMs' cost for 30(b)(6)

depositions which included employee costs and attorney fees for outside counsel to not only attend the depositions but to also prepare for the depositions. Furthermore, he also ordered the parties to pay 70 percent of OEM cost for document collection and production which includes their employee costs. He declined --

THE COURT: That's 70 percent?

MS. TRAN: 70 percent.

THE COURT: I'm sorry. I thought you said --

MS. TRAN: 70 percent. He declined at the December 9th, 2016 hearing to award costs for negotiating the subpoena. He said this was a foreclosed issue but the Court, of course, had the ability to overturn his decision.

So this cost-sharing decision, the 60 percent, the 70 percent, this was a procedural decision and it is unprecedented. In fact, we mentioned in our brief, none of the hundreds of attorneys that represent plaintiffs and defendants in auto parts are aware of such significant cost shifting in similar price-fixing cases. The parties could have and probably should have objected to the cost-sharing order given what we perceive as the law being on our side, but we did it in the interest of obtaining the OEM discovery as quickly as possible, especially since it has been two years now.

So our position is the OEMs are just causing more

delay by seeking even more than what the Special Master generously ordered, and the parties respectfully request that the Court affirm the Special Master's cost-sharing order and overrule the OEMs' objection.

And as an initial matter, the OEMs misstate the standard of review in their objection. It is not de novo. Rule 53 governs review of special master's decision and Rule 53(f) provides that the Court may, quote, set aside a master's ruling on a procedural matter only for an abuse of discretion, close quote.

Here the Special Master arrived at this cost-sharing decision after multiple rounds of mediation and multiple rounds of motion practice. He did not issue this cost-sharing order at whim. The Court should therefore review this order for the vast discretion afforded to a District Court in supervising discovery.

So Ms. Metzger emphasizes that the Court should grant sanctions in the form of attorney fees. This is a big deal. The parties' view is that we only put together a subpoena pursuant to the Court's instructions. As I mentioned, we got together -- we put together a subpoena that covered all parties and all parts cases so that we could just serve one subpoena on the OEMs, and we did that in the summer of 2015.

The OEMs now claim that it was overly broad and

imposed an undue burden on them, but how could we know what was unduly burdensome? Based on our best understanding of what was out there and what they had, we put together a subpoena that covered four different plaintiff groups -- I'm sorry, three plaintiff groups and 60-plus defendant families and covering over 40 different parts. It would have been more burdensome for different parties to serve their own subpoenas at different times relating to different parts, so this was the best way to proceed, and we were just following the Court's order on that.

Yes, the Special Master did not rule substantively on the subpoena but he's been at three mediations at this point. The substantive agreements that we've reached with OEMs, the Special Master was part of those agreements and we entered those stipulated orders in January 2017. So I don't think the question of undue burden is an issue at this point, we are past that, now we are just talking about cost shifting.

So -- let's see. At the June 23rd, 2016 hearing on the OEMs' objection to the Special Master's order on 30(b)(6) depositions, you first heard about the cost-sharing issue, and you flatly asked the parties why shouldn't we pay for it all? The answer is because of Blue Cross and dozens of similar decisions that follow the balancing test set forth in that case.

Now, you're aware from the briefs that there is a breadth of case law on cost shifting, and the parties and OEMs both cite to dozens of cases from various districts but only one case comes out this Court, and it is Blue Cross Blue Shield of Michigan. It's an antitrust case written by the magistrate judge in Auto Parts. And in that case as to costs, Blue Cross explicitly rejects cost shifting where the OEMs have an interest in the outcome of the case, where they can readily bear the costs, and where the litigation is of public importance.

So there is no case in the Sixth Circuit that addresses shifting of non-parties' attorney fees. However, other courts have applied the same test in Blue Cross to cases that do involve attorney fee shifting, and in most of those cases courts have found that non-party attorney fees incurred as a result of responding to the subpoena are generally not reimbursable. Even in the rare instances where they are, as a sanction for imposing undue burden on a non-party, courts apply the same balancing test set forth in Blue Cross.

So going back to Blue Cross, Blue Cross indicates that the parties shouldn't pay for everything because, first, the OEMs have an interest in the outcome of auto parts. They are named plaintiffs and potential members of the direct purchaser class. As of now we don't know which of them have

opted out so they are still part of the class. They have a substantial relationship with the parties. The OEMs are the defendants' main customers, the dealers are their main suppliers -- I'm sorry, they are the main suppliers to the dealers, and the end payors purchased billions of dollars of OEMs' new vehicles every year. So while the OEMs may be non-parties they are parties to both the purchase and sale transactions at issue in this case.

They also claim they are the biggest victims of this conspiracy. Well, what does the data show? If the OEMS passed through or all or some of the price fix, who would be the biggest victims then? This is the heart of the indirect purchaser action.

While some OEMs may have settled their claims against defendants for large sums, other OEMs are likely watching this litigation, trying to assess the value of their claims, whether they should settle their claims or whether they should bring a direct action, like Ford. They are invested in this litigation despite what they say.

Second point in Blue Cross: The OEMs have the ability to pay for their own costs. They are large, sophisticated multi-national corporations that can reasonably undertake this expense. In Blue Cross this Court determined that plaintiffs and non-parties can both readily bear the costs, yet this Court only shifted 15 percent to the

plaintiffs.

Like the OEMs here, the non-parties there were two large and important health systems in Michigan. One had gross revenues of 1.1 billion, the other one had 4,000 employees. In our case the Special Master has already shifted 60 percent of deposition costs and 70 percent of document collection and production costs to the parties. This is four to five times the percent of cost shifting in Blue Cross. It is an extraordinarily rich result for the OEMs.

But let's look outside of this circuit. Let's look at another case. In re First American Corporation, Southern District of New York, that court shifted 35 percent of costs to plaintiffs where the non-party was involved in the underlying transactions at issue and they were also involved in separate but related litigation, and that case also involved a strong public interest.

The last point on Blue Cross -- or last element of the test set forth. This litigation is indisputably a public interest. The OEMs don't contest this. They contend it is of lesser importance than government actions, but the criminal fines, you know, in the government actions only go to the treasury. The settlement amounts here actually go to businesses and consumers. Auto parts is one of the largest, if not the largest, MDL in history, and it impacts almost

every person and business that purchased a new car in the United States within the last 20 years. It is indisputably of public importance.

So these three factors set forth in Blue Cross weigh against cost shifting, and these same factors weigh against the shifting of attorney fees in a slew of other cases.

As to Ms. Metzger's argument on why they should get attorney fees and costs for narrowing the subpoena. An award of attorney fees from the OEMs' prospective compliance with the subpoena is not in line with case law. A non-party's attorney fees associated with litigating a subpoena are just not reimbursable compliance expenses; Stormans v. Selecky addresses this. This is especially true where as here the subpoena did not require a different level of cooperation that would exist in any other case. The OEMs were just expected to meet and confer with the parties to provide information and negotiate objections. These obligations are set forth in Rule 26 and Rule 45. For a long time the OEMs refused to do so because their opinion was that the subpoena was overly broad and unduly burdensome, but how are we going to get from something so big to narrow and reasonable if you don't talk about it? Although negotiating a subpoena has likely been more complex and time-consuming in auto parts than in other case because it involves the coordination of

hundreds of attorneys in 42 parts cases and the fact is that subpoenas are commonly litigated in price-fixing cases and costs associated with negotiations are not shifted.

In CRT, ODD, Batteries, LCD, all of these cases involve non-party discovery, they involve indirect purchaser actions, it involves subpoenas to over 50 non-parties each sitting in different parts of the distribution chain, involved discovery, cost level of discovery, purchase discovery, sales discovery at a transactional level to huge OEMs such as Apple, Dell, Microsoft, Costco, Walmart, Target. There was absolutely no cost shifting in any of those cases.

And as I mentioned before, if we had served individual responses on the OEMs in each parts case the burden on the OEMs would have been exponentially greater, so we proceeded in such a way that we thought would be the most efficient and actually the least burdensome for the OEMs.

Further, the OEMs' reimbursement for attorney fees and costs incurred was partially as a result of their own delay and obstruction. I know the Court doesn't want to hear about the fights between the OEMs and the parties, but we are here today two years later because of, you know, what we view as the OEMs' refusal to meet and confer on very basic questions from the beginning. They refused to tell us individually the availability of their responsive data and documents, the accessibility of that data, and even the

burdens and costs associated with producing such data and documents. This is why we've had the unnecessary delay and extensive litigation on OEM discovery that we have had.

Our view is that the OEMs' failure to cooperate has caused the parties to incur exorbitant attorney fees and costs of their own, and now we shouldn't be paying for the OEMs' attorney fees and costs as well.

We cite to a bunch of cases in our brief; Heartland Surgical Specialty Hospital, Apple v. Samsung, West Convenient Stores v. Suncore Energy. All of these cases say where the non-party is obstructing the non-party discovery process in some way, they should not be entitled to any costs or attorney fees.

THE COURT: What about the non-attorney costs relating to the follow-up questions? I don't think the Master ruled on that, it hasn't been before him probably, so what's your position on that?

MS. TRAN: Sure. So the Special Master only ruled on the deposition costs, which includes preparation and attendance, you're right that he didn't discuss the post-deposition follow-up questions. But here the Court shouldn't grant it for various reasons. First being the Special Master already shifted more than this Court had actually said at the June 2016 hearing on depositions. If you recall, you had said, quote, the cost of actually

attending the depositions, that cost at a minimum would be split between the parties and the non-parties, and I may later hear that it may be more but I'm saying at least that's the cost you know you are going to be split, close quote.

So not only has the Special Master ordered the parties to pay more than 15 percent, he's also ordered parties to pay the employee costs and the attorney fees for outside counsel for preparing for and attending the depositions. This surpasses what the OEMs are entitled to under the relevant law, and the parties didn't object to this ruling in the interest of bringing this discovery process to an end, but at this point the OEMs are just being greedy.

The reason why we had the depositions in the first place was because the OEMs were not cooperating during the meet-and-confer process. They were not providing the information that we needed to narrow the subpoena substantially; for example, what relevant data and documents they possess, where the information is located, what burdens they face in collecting and producing this highly relevant discovery. We didn't know the answer to any of that. That's why the Special Master at his March 2016 hearing said I don't have enough information; you parties are going to take the depositions of the OEMs to find this out so I can get more information to issue a ruling on the motion to compel.

The parties should not now be required to reimburse

the OEMs for employee costs related to follow-up questions. It is not unusual where a witness is not able to provide complete information that questions may arise thereafter. This happens in this litigation. Defendants provide -- we meet and confer on transactional data and our document requests; they give us responses, they give us documents, and we follow up with questions. We didn't need to take depositions of defendants, you know, we engaged in a very cordial process.

The need for the depositions was caused by the OEMs and so our reasonable follow-up questions thereto stem from that process. The follow-up questions that we asked the OEMs were largely the result of gaps in the record. Some witnesses, for example, I can think of a GM witness. He came, he had only been in the position for eight months. He could not talk about any sort of purchase strategy, sales strategy; he could not talk about anything in his prior role at GM and he provided contradictory testimony.

A Fiat Chrysler witness basically said that he didn't have any information on the document retention policy because another part of the Fiat Chrysler knew about that and he didn't. So these are all -- all the follow-up questions were part of the outlines and the questions that we provided to the OEMs at their request, before the depositions, so that they could prepare their witnesses, but as it turned out some

of their witnesses were not prepared so we followed up with questions.

Finally, I'm not putting the blame on OEMs here but discovery in complex cases like this one frequently leads to follow-up questions. So it occurs in every case, there are follow-up questions after depositions. It is part of the litigation process. It is part of complying with the subpoena, so they should not be awarded anything beyond what the Special Master has ordered. Sixty percent is very, very generous for discovery on discovery depositions that we shouldn't have had in the first place.

THE COURT: Okay.

MS. TRAN: And finally, on Ms. Metzger's last point regarding seeking attorney fees for document collection and production. The Special Master already awarded 70 percent of costs here.

THE COURT: Excluding attorney fees.

MS. TRAN: Excluding attorney fees, yes. Courts routinely distinguish between costs and attorney fees when they evaluate the appropriateness of cost shifting and often finds that costs are shifted but attorney fees should not be. Bell v. GE Lighting says this, Maximum Human Performance v. Sigma-Tau Healthscience, all of these cases are other districts, but they are insightful in that they show that costs are routinely shifted but attorney fees are not.

We mentioned in our brief that the Supreme Court established American rule dictates that litigants pay their own attorney fees absent statute or enforceable contract. This is Alyeska Pipeline Circle v. Wilderness Society. Courts have extended this American rule to cases involving non-parties, including non-parties that receive documents and deposition subpoenas for use in antitrust cases. This is United States v. CVS.

So in the CVS case the Supreme Court said -- the District Court said the Supreme Court had foreclosed the ability of the District Court to award fees, denying reimbursement of counsel fees for review of documents, representation at depositions, negotiations of protective orders and other matters.

Finally, what does this even entail, attorney fees for document collection and production? We can guess that it concerns a privilege, confidentiality relevance review, though none of these are reimbursement under various case law. Steward Healthcare System vs. Blue Cross Blue Shield said that the privilege and confidentiality review only benefits the non-party, it doesn't benefit the parties in that case. And the relevance review, that also doesn't benefit the parties. We have to do -- the parties have to do their own relevance review of the documents as well, and it is not like the non-parties are going to give us their work

product. We cite to a half dozen cases that stand for the same proposition.

Finally, we cite the -- I'm sorry, not finally. Fourth, the OEMs don't cite to any authority for an award of attorney fees in a price-fixing case like Auto Parts where the subpoenas seek the same types of documents and where efforts and collection and production would be the same. They cite to Blue Cross Blue Shield but in that case, as I mentioned before, only 15 percent of the costs were shifted to the parties. When the Court found that both the non-parties and the parties could bear the cost, only 15 percent shifted. Here we are dealing with 60 and 70 percent already.

THE COURT: Did that 15 percent include the attorney fees that we are talking about now?

MS. TRAN: No, that case did not address attorney fees.

The OEMs cite a slew of other cases but all of those cases are in different districts and they are all distinguishable. You know, they -- in those cases the facts are such that the non-party did not have an interest in the litigation, the non-parties were individual people who could not afford it or the cases weren't of public importance. For every case that they cite that supports their point of view we have three to four more that say -- that support our point

of view. There's just a lot of cases on this issue, but we urge the Court to follow Blue Cross Blue Shield here.

If the Court deems that non-party attorney fees are reimbursable under Rule 45 and the Court would have to make a finding that the non-parties imposed an undue burden such that they are deserving of sanctions, courts decided whether to shift such cost to the serving parties nevertheless applied the same balancing test as I stated in Blue Cross. And all of these factors in this case weigh against shifting of attorney fees.

To my final point, which is a policy argument. If the Court awarded OEMs with further attorney fees and costs for their mere compliance with the judicial process it would establish a dangerous precedent nationwide. The OEMs should not be awarded attorney fees and costs just for merely cooperating with the judicial process. Blue Cross is clear on this. A non-party is not entitled to cost sharing just because it was served with a subpoena. That is exactly the OEMs' position here.

As I mentioned, CRT, LCD, Batteries, ODD, S-RAM, they are all antitrust cases with indirect purchasers involving non-parties. In each of those cases over 50 non-parties each received and complied with subpoenas seeking transactional level purchase data, transactional level sales data, cost data, and none of the OEMs there, HP, Dell,

resisted the subpoenas. No costs were shifted. In about half of the six -- five cases that I mentioned there were motions to compel but only one, Maximum One, and only with respect to a small OEM, and all of those motions to compel were resolved in the parties' favor.

The special master of the court in those cases granted the motion to compel and did not order any costs or attorney-fee shifting. And all of these we had in our reply to the first motion to compel, we have a chart, and we have a declaration setting forth all of this.

Even when a court finds that a non-party's costs are significant within the meaning of Rule 45, and some cost shifting is in order, it is critical that only reasonable expenses are shifted, and this is according to G & E Real Estate, Inc. vs. Avison Young-Washington.

The Special Master already shifted 60 percent of deposition costs including attorney fees and 70 percent of document and collection -- document collection and production excluding attorney fees to the parties. This is more than reasonable for the OEMs and does not suggest an abuse of discretion -- of his vast discretion.

THE COURT: Okay.

MS. TRAN: Thank you.

THE COURT: Thank you. Reply?

MS. METZGER: Yes, thank you.

MR. HEMLOCK: Your Honor, may I have a few words?

THE COURT: Certainly.

MR. HEMLOCK: I will be brief. Thank you, Your Honor.

Adam Hemlock, again, on behalf of the Bridgestone and Calsonic defendants, Your Honor.

Just a few quick points I would like to follow up with. First is Ms. Metzger, again, brought up this notion of sanctions, and that's serious stuff. I want to point out that the Special Master repeatedly throughout this process has lauded the serving parties for having cooperated, for having been reasonable and so on. Never once has he ever said anything leading anyone to believe that the serving parties were so unreasonable or so unfair that they should be sanctioned, and he was intimately involved in the process. There were multiple mediations, he had multiple briefings and so on. So there is absolutely no basis whatsoever for there to be kind of a sanctions conversation regarding the costs at issue here.

Second, the OEMs are talking about avoiding undue burden and undue expense. They have talked about how many topics that were in the initial subpoena. Well, let me point out, the last offer that the OEMs provided for what they would produce had two topics, one of which was MSRPs, which is frankly public information. Okay. Special Master Esshaki

eventually ordered, I believe it was, 14 topics. So should we, the serving parties, should we get our money back for having to narrow the subpoena where we did? We narrowed it to 14, we actually narrowed it to where the judge thought it was reasonable, but they came back with two. Why shouldn't they pay the money we had to spend -- our clients had to spend on me and the other counsel negotiating to get where we were? That's point number two.

Point number three, we talked about the follow-up on deposition questions, Your Honor, this happens all the time, especially with 30(b)(6) deposition where a witness has to be well prepared on certain topics. We've had it in our cases, we've had 30(b)(6) depositions where the EPPs and the ADPs ask a lot of questions and there are a few points that the witness doesn't know, doesn't recall. You know what, during the break every time I go up and say that was a reasonable question, we will get you an answer to that. That's normal, that's the way it works. It's unreasonable to expect that through seven hours of testimony a witness is going to remember everything. I'm actually, kind of in a sense, defending the OEMs in I'm not saying I'm not surprised that there were certain questions they were unable to answer but we count on the fact that reasonably after a deposition there may be some questions that are squarely within what was called for that they should have known and if they didn't

they just tell us afterward. That's entirely appropriate.

Finally, Ms. Metzger spoke of the analogy of throwing everything up there and seeing what sticks. Well, there's some truth to that but it is not unreasonable for two reasons.

One, never did the OEMs give us any indication of what they had, what was electronic, what was paper, what was burdensome, what wasn't, so we had no choice but to start with the broad subpoena, but the point was we did count on the meet-and-confer process because in every discovery dispute, every discovery process I've ever been in, I bet everyone in this room, you meet and confer and you negotiate it out. What the OEMs said is we are not even talking to you guys until we have an agreement on costs, and all the case law says very clearly that you first figure out the scope of discovery and then you address costs. So they put the cart before the horse and then the cart and the horse couldn't go anywhere because they wouldn't give us the information that we needed to have an educated conversation about discovery.

Finally, you know, in terms of equity and fairness and who is paying for what, look at my clients, Your Honor, Bridgestone and Calsonic. They've paid for me to come to this Court, to mediate, to do all of these things on behalf of all the defendants in this case with respect to OEM discovery. Now, I will concede they didn't do this out of

the goodness of their hearts, they did it because they thought it was in their interest, but there are tons of defendants in this case who have not spent a single penny litigating these OEM discovery issues. Should we come to the Court and ask for an order from you that we get reimbursed for that? Or how about Mr. Cherry who stood up here for years representing the interest of all the defendants in the MDL and advocating things on everybody's behalf. Should he come now and get reimbursed for these things? There are just certainly costs that we undertake, including attorney fees, that are natural and reasonable in litigation. They are what happens, and I really doubt that this Court wants to start now doing what I would call litigation on litigation; every time there is a dispute and it is figured out outside of this courtroom then there is going to be dispute about who should be reimbursed for it. It would be wholly unreasonable.

And lastly, this is a point that Ms. Tran made, but I want to echo it, the policy considerations here are huge. If I want to try to meet and confer with the other side, should I really have to worry that ultimately I will have to pay for their costs to meet and confer? No, I will just come to the court because I don't want to have to deal with that uncertainty, and then the courts are going to be bogged down with all of these disputes about dollars and cents here and there which I'm sure they don't want.

Thank you very much, Your Honor.

THE COURT: Thank you. Reply?

MS. METZGER: Thank you, Your Honor. To address a few of Ms. Tran's points. To say that the OEMs are still fighting the subpoena is simply not true. We've come to conclusions about what we are going to produce, that's done. What we are fighting for right now, Your Honor, is our right -- the clients' right as non-parties to this litigation who had no part in helping to draft this omnibus subpoena, who simply received it. There was no meet and confer beforehand.

I was a little confused about something Mr. Hemlock said about we wouldn't provide them information about what we had therefore they had no choice but to serve this huge subpoena. We had no conversations with them before they served the subpoena. We simply got the subpoena, this omnibus subpoena, with everybody's requests conglomerated into one giant mass. There was no meet and confer beforehand.

THE COURT: So there was no request for a meet and confer?

MS. METZGER: There was no request for a meet and confer from my clients and any other that I am aware of that received the subpoena, we simply received the subpoena, and that was the first thing we heard about this. We were not

involved in the negotiation stage. I think Ford Motor Company was a party at the time and they may have been involved, but as to the rest of us we were not parties, we were not part of the negotiation. We simply received the subpoena and the subpoena is what it is.

Ms. Tran talked about having narrowed the subpoena down to 14 requests. That did not occur, Your Honor, until October 14th of 2016, we received the subpoena in July of 2015. So we are going on, what, 15 months of litigation before we received those narrowed requests. And as to the narrowed requests themselves I would direct Your Honor to please review Exhibit 3 on Document 1227. I've got a copy here if you would like it right now, I will be happy to provide it for you. It is a chart that we put together -- the OEMs put together showing what requests were withdrawn and how those requests were duplicated, most of those requests were duplicated in the requests that remain.

So the 14 -- the narrowing down from 37 to 14 was a cosmetic change, it was a reduction in number, it was not a reduction in burden. And, again, Document 1227-4 sets forth our analysis of that issue and I've got a copy of that here if you would like it, Your Honor.

THE COURT: Thank you.

MS. METZGER: As for the OEMs banding together, that was a move that was designed to address common issues,

common objections to the subpoena, common problems with the subpoena that were frontline issues that needed to be resolved before we got into the leads individually. When we came to the meet-and-confer process wondering and asking whether we needed to produce any documents at all, and we've heard some testimony or some conversation from the parties' counsel today about what we would not provide. We asked at the outset that the parties tell us what do you already have, what can you get from each other, what are the gaps in the record that you think we can reasonably fill? That was in our first communication to the parties as a group. Those are frontline issues because if they already have what they need we don't need to produce anything at all. So the OEMs went into this global summit, the October 2015 communication with the parties, banding together as a group to ask questions which would lead us to wonder whether we needed to produce any documents at all. The group, whether there were things that we could produce in the record, that there were gaps in the record that we could fill, we never got an answer to that question. We never got an answer to what do you already have? We never got an answer to what can you get from each other, even though there had been extensive discovery going back and forth, we know they had a million pages of documents, we asked those questions repeatedly.

The exhibits to Document 1227 in the record show

our exchanges back and forth. There were a series of letters, it is all documented there, we can all put our individual spins on what that looked like; were we withholding, were we obstructing, were they obstructing, the letters speak for themselves. And you will see, Your Honor, when you review those letter that from the very beginning we were asking questions about whether or not there needed to be any production from us at all, not the scope of production, that would come afterward, but we needed to know and the smaller SSEs, the ones that had insignificant market share in the US market, would we contribute -- my client is one of those, Subaru of Indiana Automotive, would we contribute anything to your analysis? We had an expert that said no, we would essentially not contribute anything to that analysis.

So our questions going into the meet and confers was why do we need to produce documents in the first place? Why don't you get things from other people first, from each other, perhaps what has been offered from some of the other SSEs in response to the subpoena, look at those first and then turn to us. So that's what we were litigating up until October 14th of 2016 when we got this narrowed list of document requests that were not really narrowed at all, they were just renumbered and made to look like they were less but were not, in fact, less.

As to the unprecedented scope of what has been

characterized as what the Special Master has done for us, we would ask Your Honor to please consider that the scope of the subpoena itself is unprecedented. So what relief we are entitled to in response to our request under Rule 45(d)(1)? This is the largest subpoena of its type, no one has ever pointed to a subpoena that is broader and larger, so we don't know what the largest subpoena ever served on a group of individuals will get in response to a request for relief under Rule 45(d)(1).

So maybe what the Special Master gave us, given the small sample size, we don't know if that's generous or not generous. We think we are entitled to more, not because we are being greedy, not because we are being selfish. In fact, what we are asking for here is 60 percent, not our entire award of attorney fees; we are asking for the same number to be applied to the attorney fees and other costs associated with narrowing the scope of the subpoena.

And that brings me perhaps to my biggest point. There are two possible awards under Rule 45. It is not Rule 45, there's Rule 45(d)(1) and there's Rule 45(d)(2)(B)(2), and they are two different things. The cases that cite the Blue Cross standard, the four-factor test on whether cost shift is appropriate, those are awards under Rule 45(d)(2)(B)(2), those are cost of compliance. We are not asking -- with regard to subpoena, we are not asking for

cost of compliance, we are asking for a sanction -- I will say it both. We are asking for a sanction for service of a subpoena that is wholly inappropriate, that was wholly uncurated, that impose considerable burden and expense on us, on the SSEs, and that is not subject to the four-factor Blue Cross test. And if there is a case out there in which that test is applied I will be happy to stand corrected, if the other side would like to cite one that would be wonderful, but the cases that we've seen, the cases that's award under Rule 45(d)(1) do not apply the four-factor test.

What the test is for an award of sanctions under Rule 45(d)(1) is whether the person who served the subpoena took reasonable steps to avoid imposing undue burden and expense, and if that is found to be the case that they did not, that they did not take reasonable steps to avoid imposing undue burden and expense, the Court is constrained because the rule says the court must enforce this duty and impose an appropriate sanctions which may include lost earnings and reasonable attorney fees.

So if Your Honor finds that the parties did not take reasonable steps to avoid imposing undue burden and expense, our position is that the Court must impose sanctions upon the parties which may include lost earnings and reasonable attorney fees.

And in order for the Court to find that the parties

did not fail to take reasonable steps to avoid imposing undue burden and expense, the Court would have to find that the subpoena as served was reasonable, that the back and forth between the parties and the SSEs that's documented in our correspondence, which we would direct Your Honor to, showed some unreasonableness on our part and perfect reasonableness on their part when from the beginning we were asking please tell us what do you have -- simple questions, what do you have, what do you need, what are the gaps in the record, and how can we fill them? We never got an answer to those very, very basic questions which would make it clear that if they already have what they need they don't need anything else from us. So that was our purpose going into this meet-and-confer process. We never got an answer to that question, nor did we ever get an answer to the question what did you do to curate the subpoena? Your Honor asked that question 15 or 20 minutes ago and didn't get a response. You know, what steps did you take to avoid imposing undue burden and expense? We've heard nothing about that.

What we did hear, there was some testimony that we cited in our reply brief that the parties testified at some point that they put together their collective requests into a single document and that is what they say comported with the Special Master's directive to serve a single subpoena to avoid imposing undue burden and expense. It is not just

serve a single subpoena; it is serve a single subpoena that lessens the burden, and how can that possibly be the case if all they did was take all the subpoenas that they would have served separately and serve them in one document? That's a single subpoena but it doesn't lessen the burden and expense on us.

And that's what we are fighting for is our clients who are not parties to the litigation. My client in particular, Subaru of Indiana Automotive, is a very small company, it is not Apple, it is not Dell. As a matter of fact, when I talked to my client and said we are being compared to Apple and Dell, he laughed and he said we are a mom-and-pop shop compared to Apple. You know, we have a three-person legal team. We have, aside from DOJ subpoenas that we received in this case, we have not had any significant litigation at Subaru of Indiana Automotive that involved more than a nominal discovery burden, and that's in our general counsel's affidavit that is in Document 1227, I believe it is Exhibit 44 or 47, I'm sorry I don't remember which one, but we are not in the same position as Apple or Dell or some of the larger SSEs here. So to step Subaru of Indiana Automotive aside a little bit we've got those issues.

Further, to my client, when we were told that after the mediation in March, I believe, of 2016 the Special Master said he did not have enough information and ordered the

30(b)(6) depositions, Subaru did not take part in those mediations. We were there but we were not asked to contribute any information. So, you know, there could have been no fault on our clients since our information was not taken at that mediation, nor was there any complaints by the parties about the quality of the testimony provided by our deponent in the 30(b)(6) depositions, so, you know, those are some issues in which Subaru of Indiana Automotive is separate.

As for the public policy argument, we can make an equal and perhaps stronger public policy argument. Judge Alsup from the Northern District of California, as I cited before, said that parties need to be reasonable at the outset. They can't just throw things up against the wall and see what sticks, otherwise other parties would be in the same -- other non-parties would be in the same position that our clients are in right now. So the countervailing public policy argument is why not impose these sanctions upon the parties for their failure to take reasonable steps to avoid imposing undue burden and expense so this doesn't happen to anybody else? They have a responsibility to curate the subpoena before they serve it, decide what's important, prioritize like we do in litigation all the time, make those tough choices, decide what you really need and not just shoot for the moon and leave it to us to pick up the ball, spend

money that we don't have to spend trying to narrow the scope of that subpoena.

To call our efforts to narrow the scope of the subpoena prospective compliance is really interesting. I believe that was something that Ms. Tran said. Prospective compliance is not what we are talking about here. To try to conflate attempting to narrow the scope of the subpoena as a Rule 45(d)(2)(B)(2) cost of compliance and apply the cost-shifting analysis is completely disingenuous.

Again, we are looking for sanctions under Rule 45(d)(1) for the parties' failure to take reasonable steps to impose undue burden and expense.

THE COURT: Thank you.

MS. METZGER: Thank you.

THE COURT: Okay.

MS. METZGER: Thank you, Your Honor.

MS. TRAN: If I may, just in response?

THE COURT: Ms. Tran.

MS. TRAN: Ms. Metzger suggested that the parties should have reached out to the OEMs prior to serving the subpoena.

THE COURT: Well, Mr. Hemlock said that they tried that and they said they never knew that they were getting a subpoena.

MS. METZGER: Respectfully, we are not saying they

should have reached out to us prior to serving a subpoena.

MS. TRAN: Ms. Metzger doesn't point to any case law that suggests we had a duty or an obligation to do this. Typically in cases like this and others, the parties serve the subpoenas and then the parties and non-parties meet and confer on the subpoena to then narrow the scope. So it feels like she is putting forth an obligation that didn't exist and is not backed by case law.

On the argument that the parties did not take reasonable steps to narrow the subpoena until October 2016, that's just absolutely false. When we filed the reply in support of our initial motion to compel, it attached the declaration of Steven N. Williams, which attached Exhibit A. It listed every request and sub request and the status, it indicated where we stood, which requests had been withdrawn by the parties, the few requests that -- I think it was the two requests that OEMs had actually agreed to produce responsive documents, and the rest of the issues were impasse, so we did make efforts and that document, Exhibit A to the declaration of Steven N. Williams supports that.

And we can go back to all the correspondence but I think the Court has seen enough paper here to know that the parties have been making efforts, and, as Mr. Hemlock said, the Special Master has commended us all along the way with our efforts to work together and to work with the OEMs to try

to get this done.

Ms. Metzger insists on the Court imposing sanctions on parties. I just want to give an example of a case where a court has imposed sanctions on a party in the form of attorney fees. Straight Path IP Group, Inc. v. Blackberry, in that case the serving party subjected the non-party, NetFlix, to multiple rounds of duplicative and repeated discovery requests in multiple-related actions. We don't have that here. We have one subpoena, one round of requests covering all 45 actions, all parties, all cases.

The court's decision in Straight Path to impose sanctions and award NetFlix's attorney fees rested on, quote, a parade of overbroad discovery abuse in four actions involving the same patents, close quote. And the fact that the serving party, quote, twice propounded oppressive discovery requests only to ask for a broad subset once briefing is required, closed quote.

The facts are clearly different here, but I just wanted to point out this case to show the type of case where courts award attorney fees as sanctions. I don't think we have the same facts here.

As to Ms. Metzger's argument that the OEMs served various initial preliminary questions on the parties and the parties didn't answer them, between September 2015 and January 2016 when we filed the first motion to compel we

exchanged 15 meet-and-confer letters. We repeated our willingness to discuss appropriate cost sharing once OEMs had the opportunity to determine what responsive information they have and what reasonable costs would be associated with production. However, they said they wouldn't even begin searching and producing documents until we had an agreement on costs. So there was only so much we could do in the early months of OEM discovery because they wanted a cost agreement when we didn't even have a substantive agreement. In fact, we just got substantive agreements four months ago in January.

So it is not that we weren't -- we were refusing to answer their questions, we were, but they were just refusing to substantively meet and confer with us until we said we would pay for everything.

Finally, Ms. Metzger mentions Subaru's size and how it is so much smaller than all of the other OEMs. Well, that doesn't matter because the component cases I mentioned, ODD, CRT, Batteries, all of those cases involved non-party discovery and subpoenas to various non-parties of different sizes. I mentioned Apple and Dell but CompUSA, Fries (phonetic), Jabble (phonetic), they were also subpoenaed, and they all complied, and they all paid for costs. None of them resisted the subpoena, and none of them asked for costs or attorney fees.

Thank you.

THE COURT: Thank you.

MR. HEMLOCK: Two minutes, Your Honor, may I? Thank you. I promise I will be very brief.

Just to clarify, and Ms. Metzger is correct, I did not mean to imply -- so to be clear I believe the subpoenas were served and then afterward, of course, there was an effort made to meet and confer. I think the fact that we didn't meet and confer before we served the subpoenas is not really such a meaningful point because if we had called up the OEMs and said, oh, we would like some documents and data from you they would have said well, what would you like, and we would have sent over our draft subpoena. So whether we served it and then had a productive meet-and-confer process or we sent the draft really doesn't change anything.

You know, Your Honor, Ms. Metzger has talked about duplicative discovery, what do we have, what do we not have. There was a huge entire body of discovery that we would not have had which is about how they priced their cars, how they sell them, who they sell them to, data about sales of cars, et cetera, that was not available. We have a discrete number of ADPs who are named plaintiffs in the case and they know who they bought cars from and so on, but only they have that, and it is not like they said -- -

THE COURT: Did you ask for duplicative -- did you

ask for information that you already had?

MR. HEMLOCK: Well, we did in a sense but bear in mind, Your Honor, that the parties were in the discovery process, the lead cases were in the discovery process, there were deadlines to that discovery process. To figure out what everybody had and only then ask the OEMs for the discovery would have set back the case, I would guess by six months to a year. There's a lot of case law that says that the parties don't have a duty to figure out what is duplicative. Furthermore, it also comes back to the burden issue. In other words, we might have had a sense that we might have some documents and information that would be duplicative, but if we know that they have it readily available sitting on a hard drive versus say, 400 boxes of documents say, in a warehouse somewhere, that would have been relevant to the analysis. I think at the end of the day the bottom line is if we had had a healthy discussion about all of this we would have figured it out, but there was zero interest on behalf of the OEMs to do so.

Finally, just one more quick point. Ms. Metzger has talked about undue burden several times. I'm not sure what undue burden she is talking about. Okay. The subpoena was served on the OEMs, there is no undue burden there except her having a piece of paper that they received. Let's say instead of 15 topics we had served a request for six topics,

and bear in mind again that their last offer was only to produce two topics, we still would have had to meet and confer. We still would have had to do that.

By the way, among the OEMs they split up the meet-and-confer process. The letters that we received were not from Ms. Metzger's firm, they were from Proskauer Rose which represented Chrysler, I believe, so I'm not sure what huge burden she's undertaken, even up until now. And now we sit here with Special Master Esshaki having educatedly decided what a reasonable scope of discovery was with respect to the OEMs. We are talking about the cost but he's decided what the scope should be, and so, you know, to some extent we are dealing with a reasonable burden, the only question is the cost. We don't think they are entitled to anything but certainly not entitled to more than the generous amounts that have been provided already.

Thank you very much.

THE COURT: Thank you. Ms. Metzger?

MS. METZGER: Thank you.

THE COURT: You will have the final word.

MS. METZGER: Thank you, Your Honor. Somebody has to stop, right?

With respect to what the Special Master has done and has not done, to be very clear, the Special Master has never blessed the subpoena, has never said this is a

reasonable subpoena, this is a proportional subpoena, this is an appropriate subpoena, he has never said that. He has never made any pronouncements whatsoever about whether the scope of discovery either at the outset or as we have narrowed it individually with the serving parties is appropriate or inappropriate. Those were negotiated resolutions, they were not the Special Master saying you must produce, this is reasonable, this is unreasonable, it is not that. These were negotiated solutions.

The Straight Path case that Ms. Tran talked about as an example of an award of sanctions under Rule 45(d)(1). Yes, the facts are different, they are, we can't deny that. But the Straight Path court never said these are the only set of facts under which sanctions under Rule 45(d)(1) are appropriate, this is simply an example. And for the reasons that I spoke about early, the scope of the subpoena, the parties' effort to narrow, this is another example of when that is appropriate.

As to what Mr. Hemlock and Ms. Tran said about our refusal to engage in the meet-and-confer process about what we had. The initial question, Your Honor, when we started to meet and confer as a group -- and by the way, the letters came from the group, they had to be drafted by somebody, but to say that my client incurred no significant burden when we were all working together as a group to come up with one

letter is not appropriate. That letter was written by someone, it is the result of the group's negotiations.

At any rate, to say that we would not engage in discussions about what we had before we talked about money, that's true because the initial question when we started to meet and confer is do we need to produce anything at all. Are we too small to need to produce anything and/or do you already have what you need, in which case we don't need to search for documents, we don't need to look for documents, we don't need to use employee time, employee effort, if you already have what you need or if we are so small we are not going to make a difference.

So, yes, if they wanted us, before answering those questions, which they never answered about do you already have what you need, if they wanted us to start in on the process of engaging on what we had, we did want an agreement on cost sharing because we didn't think we had to produce anything at all or at least we were questioning whether we needed to produce anything at all. So that's the purpose of that part of the meet and confer.

And finally, Your Honor, when Ms. Tran said that the size -- to speak of my client particularly, when she said size doesn't matter, it is precisely the problem, that the same subpoena was served on a wide swath of OEMs, non-OEMs, huge OEMs, small OEMs, OEMs that were eventually dismissed

for -- relieved of their obligations to produce documents because of their size. Everybody received the same subpoena.

So to say that, yes, size doesn't matter and to be apprised about that, size in this case did matter because we had an expert, Dr. House, who testified that our size was such -- Subaru of Indiana Automotive size was such that our documents would not have made the difference in the final analysis. The larger SSE group had Dr. McDonald as an expert who testified essentially to the same thing, and those declarations from those two experts are available in our response to the original motion to compel.

Thank you, Your Honor.

THE COURT: You're arguing today though on behalf of defendants, not only your client, the other defendants that have signed the document?

MS. METZGER: Are you talking to me?

THE COURT: I'm sorry, not defendants, OEMs.

MS. METZGER: Yes.

THE COURT: Like Toyota and Honda, they are not so small.

MS. METZGER: No. Well, that smaller SSE argument is particular to the smaller SSEs, but the larger issue such as was this subpoena reasonable to begin with, were the negotiations entered in good faith, how soon did they actually narrow the scope of the subpoena, that applies to

all of us, everybody who received the subpoena.

THE COURT: Okay. This subpoena has taken up an undue amount of time, both the parties, the OEMs, the Master and the Court. I'm sure when it was submitted it was like a lead balloon because it was so large, there is no question about that, that it was a behemoth subpoena but so is this case unfortunately. And the Court gives due respect to the Master in this case, and I note on this that the Master's -- excuse me, that the standard here of review on this procedural matter is abuse of discretion, not de novo, and the Court looks at that and considers it very carefully because there have been so many hearings and the subpoena arguments have gone over such a lengthy period of time and, you know, now we are talking about costs of discovery on discovery. It is somewhat bizarre that we are in this position on a discovery of discovery motion.

The first issue that the Court will address is whether there should be additional costs awarded to the OEMs for their efforts in narrowing the subpoena. The OEMs look at this as a sanction under 45(d)(1) and I -- the OEMs present documents and statements of what they went through trying to narrow this subpoena, the parties talk about what they went through to try to get the OEMs to talk to them and that the OEMs would not talk to them until they had the cost issue resolved so that it couldn't be narrowed.

I don't know, you know, there are a lot of dogs in that fight and I don't know who is to win, and I have no intention of going through hearings on this discovery on discovery subpoena because I haven't heard anything that tells me there was an abuse of discretion by the magistrate, and, again, I stress that is the standard that we have to use.

The Court therefore finds that in terms of the narrowing this motion is denied, the additional cost or sanctions, as they are called, are denied.

In terms of the OEMs' notice or whether the OEMs are entitled to non-attorney cost related to the post-deposition follow-up questions, this cost shifting that we have been talking about here today, I think they are, and the reason I think they are is had those deponents known the information they would have taken time and would have been reimbursed to refresh and to garner that information.

Obviously there's follow-up questions, and I agree with the parties that there usually always are some follow-up questions to this scenario, but because of the follow-up questions relating to what was in the depositions for which costs were -- non-attorney costs were allowed, I think it should apply to the follow up. I don't find this duplicative.

If, for instance, as was mentioned, one person who

was testifying didn't know about something that was on the sheet, the list of what you were going to go into for depositions, it is unfortunate but one person can't know everything, and it is not unusual that this type of thing would happen in a circumstance like this, so you need somebody else to find that information and answer the question, and that is exactly the type of costs that was referred to by the Master. So even though the Master did not address this subsequent question, I think it should be just as if this happened at deposition.

And as to the attorney fees related to -- should there be attorney fees related to document collection and production, the Court finds that there -- that it should again reject this position and the Court finds that the subpoena was not, in fact, unduly burdensome given the scope of this litigation as it was narrowed down, and I don't believe that there should be any additional reimbursement for that. I don't believe that there has been a showing at all that the Master abused his discretion in splitting the costs as he ordered. And that is the order of court. Thank you. The Court will prepare an order.

MS. METZGER: Excuse me, Your Honor. Your Honor, could I make one statement? Just to preserve the record, we would request that the Court reconsider its ruling as to the standard of review for the Special Master's determinations;

that the appropriate standard of review is actually a de novo review and not abuse of discretion because the Special Master failed to issue findings of fact and conclusions of laws, and to the extent that he did those were incorrect.

THE COURT: Do you want to respond to that for the record?

MS. TRAN: I just have one point to make. Despite Ms. Metzger saying the standard of review is de novo, I will point to the OEMs' objection, Document Number 1602, at page 13; the parties note that despite the OEMs arguing that the standard of review is de novo, the OEMs contend, quote, the Special Master abused his discretion in refusing to order the parties to pay these costs as Rule 45(d)(1) requires, close quote. So although they've said that the standard of review is de novo the analysis was based on abuse of discretion.

THE COURT: I mean, the Court ruled on it on abuse of discretion, and your request for the Court to reconsider it is noted for record.

Counsel, do you have anything else that you wanted to add?

MR. HEMLOCK: No, just that, of course, we oppose that motion.

THE COURT: Okay. Thank you.

MS. TRAN: Thank you.

MS. METZGER: Thank you, Your Honor.

THE LAW CLERK: All rise. Court is adjourned.

(Proceedings concluded at 4:03 p.m.)

*CERTIFICATION*

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In re Automotive Parts Antitrust Litigation, Case No. 12-02311, on Thursday, May 4, 2017.

*s/Robert L. Smith*
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 05/17/2017

Detroit, Michigan